

UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re

**DISTRIBUTION OF 2004, 2005, 2006, 2007,
2008, and 2009 Cable Royalty Funds**

**DOCKET NO. 2012-6 CRB CD
2004-09 (Phase II)**

In re

**DISTRIBUTION OF 1999, 2000, 2001, 2002,
2003, 2004, 2005, 2006, 2007, 2008, and 2009
Satellite Royalty Funds**

**DOCKET NO. 2012-7 CRB SD
1999-2009 (Phase II)**

**ORDER GRANTING MPAA AND SDC MOTIONS TO STRIKE IPG AMENDED
WRITTEN DIRECT STATEMENT AND DENYING SDC MOTION FOR ENTRY OF
DISTRIBUTION ORDER**

On August 26, 2016, the Copyright Royalty Judges (Judges) received from the Settling Devotional Claimants (SDC) a Notice of Consent to 1999-2009 Satellite Shares Proposed by Independent Producers Group, and Motion for Entry of Distribution Order (Notice). In response the Judges ordered the parties to show cause why the Judges should not order final distribution of the remaining satellite royalties as proposed in the Notice. Order to Show Cause (Sept. 6, 2016) (Show Cause Order).¹ On September 2, 2016, Independent Producers Group (IPG) opposed the Notice, noting that it had filed an Amended Written Direct Statement (AWDS) with the Judges on August 31, 2016, which included different proposed allocations from those on which the Notice relied. IPG's Opposition to SDC's Motion for Entry of Distribution Order at 2 (Sept. 2, 2016) (Opposition).²

IPG's filing of the AWDS triggered several additional filings. On September 2, 2016, the Motion Picture Association of America (MPAA) filed a Motion to Strike Amended Direct Statement of IPG (MPAA Motion to Strike). The SDC filed a reply in support of the Notice and joined the MPAA Motion to Strike on September 9, 2016 (SDC First Reply). IPG opposed the MPAA Motion to Strike on September 12, 2016 (IPG Opposition to MPAA Motion), and opposed the SDC's motion to strike (contained in the SDC First Reply) on September 16, 2016 (IPG Opposition to SDC Motion to Strike). MPAA replied on September 16, 2016 (MPAA Reply), and the SDC replied in support of its motion to strike on September 22, 2016 (SDC Second Reply). On September 28, 2016, IPG filed a motion to strike the Declaration of Erkan Erdem, Ph.D. that was attached as Exhibit A to the SDC Second Reply (IPG Motion to Strike). The SDC responded on September 29, and IPG did not file a reply.

¹ Although IPG's Opposition is dated earlier than the Show Cause Order, the Judges did not actually receive it until after they had issued the Show Cause Order.

² IPG also filed a separate response to the Show Cause Order (that largely incorporated its Opposition by reference) on September 12, 2016.

The blizzard of pleadings just described presents two distinct, though interrelated, questions for the Judges to resolve: (1) Whether the Judges should strike IPG's AWDS; and (2) whether the Judges should make a final distribution of satellite royalties in the devotional category based on the shares IPG proposed in its Written Direct Statement (WDS). The Judges address both questions (together with any ancillary issues) in this Order.

I. Motions to Strike IPG's AWDS

A. Background

IPG filed its AWDS the day before the parties were to deliver initial discovery requests in this proceeding. The AWDS does not describe how it differs from IPG's original WDS and, apart from the modifications to the proposed royalty shares, the differences are not apparent without careful scrutiny. Both MPAA and the SDC submitted declarations by their economic consultants describing the changes that they discovered in their examination of the two submissions. *See* Declaration of Erkan Erdem, Ph.D. (Sept. 9, 2016) (First Erdem Decl.); Declaration of Jeffrey S. Grey, Ph.D. (Sept. 15, 2016) (Ex. A to MPAA Reply) (Grey Decl.); Declaration of Erkan Erdem, Ph.D. (Sept. 22, 2016) (Ex. A to SDC Second Reply) (Second Erdem Decl.). The salient difference between the WDS and AWDS appears to be a change in the formulas employed by IPG's economic consultant, Dr. Cowan, to compute relative shares of satellite royalties. *See, e.g.*, First Erdem Decl. ¶ 3 (Sept. 9, 2016) (First Erdem Decl.). While the formulas in IPG's original WDS described a linear relationship, the formulas in the AWDS describe a logarithmic relationship. *See* Second Erdem Decl. ¶ 6. IPG does not explain this change in the AWDS, and describes it as a "corrected" calculation in its pleadings. *See, e.g.*, IPG Opposition to MPAA Motion, at 5.

MPAA and the SDC offer two principal bases for rejecting IPG's AWDS. First, they argue that IPG's AWDS does not comply with section 351.4(c) of the Judges' rules, since it is not based on "new information received during the discovery process," and does not "explain how it differs from the written direct statement." *See* MPAA Motion to Strike, at 3; SDC First Reply, at 1-2. MPAA asserts that IPG's AWDS should, therefore, be stricken, while the SDC argues that it is a "legal nullity." *See* MPAA Motion to Strike, at 3; SDC First Reply, at 1-2. Additionally, MPAA and the SDC argue that IPG improperly presents a new or modified methodology in its AWDS. *See* MPAA Motion to Strike, at 3-5; SDC First Reply, at 2-5.³

For its part, IPG offers several arguments why the Judges should accept its AWDS. IPG notes that 37 C.F.R. § 351.4(b)(3) permits a party to "revis[e] its claim at any time during the proceeding up to, and including, the filing of the proposed findings of fact and conclusions of law." IPG asserts that it merely corrected errors in its original calculations, and its AWDS constitutes a revised claim under section 351.4(b)(3). *See* IPG Opposition to MPAA Motion to Strike, at 1, 5-6; IPG Opposition to SDC Motion to Strike, at 1-2, 10-11.

IPG also argues that section 351.4(c) does not preclude "revision or amendment to a claim amount" that is not "based on 'information received during the discovery process.'" IPG Opposition to MPAA Motion, at 6. IPG reaches this conclusion based on the "permissive, not restrictive" language of section 351.4(c). *Id.* Moreover, IPG posits, as an aside, that the AWDS

³ The SDC also argues that IPG's AWDS should be rejected on grounds of judicial estoppel. *See* SDC First Reply, at 8. Given the Judges' ruling (based on the Judges' procedural rules), the Judges need not consider this argument.

complies with section 351.4(c) because IPG learned of its “miscalculation” “during the discovery process.” *Id.*

Finally, IPG argues that neither MPAA nor the SDC were prejudiced by its filing of the AWDS. *Id.* at 4-5; IPG Opposition to SDC Motion to Strike, at 9. IPG asserts that the differences between its WDS and AWDS are “fairly apparent” and that MPAA and the SDC had adequate time to formulate their discovery requests. *See* IPG Opposition to MPAA Motion, at 4-5; IPG Opposition to SDC Motion to Strike, at 9. Throughout, IPG maintains that the AWDS merely corrects errors in the WDS, and does not present a new or modified methodology. *See, e.g.,* IPG Opposition to MPAA Motion, at 2-4; Declaration of Dr. Charles Cowan ¶ 3 (Sep. 9, 2016) (Ex. A to IPG Opposition to MPAA Motion) (Cowan Decl.).

B. Analysis and Ruling

1. Section 351.4(c)

Section 351.4(c) of the Judges’ procedural rules, which addresses filing of amended written direct statements, states

A participant in a proceeding may amend a written direct statement based on new information received during the discovery process, within 15 days after the end of the discovery period. An amended written direct statement must explain how it differs from the written direct statement it will amend and must demonstrate that the amendment is based on new information received during the discovery process.

37 C.F.R. § 351.4(c).

The rule establishes a time period during which a participant may amend its written direct statement as of right (*i.e.*, without permission from the Judges). However, the rule does not open the door to any and all amendments: the rule limits amendments as of right to those based on new information received during the discovery process.⁴ In addition, the rule requires parties to meet certain formal requirements. A party must explain how the amended statement differs from the original, and must “demonstrate” that those changes are based on new information received during the discovery process.

IPG’s AWDS fails the requirements of section 351.4(c) in both form and substance. In form, IPG failed to explain how its AWDS differed from its original WDS, and failed to demonstrate that the amendment was based on new information received during the discovery process. These formal requirements serve a dual function: they assist other participants in identifying the new or modified material in the amended statement, and they assist the Judges in ensuring compliance with the substantive restriction on filing amended statements as of right. IPG’s failure to comply with the formal requirements of section 351.4(c) placed an unnecessary burden on the Judges and the other participants. IPG’s contention that the differences between its WDS and AWDS “were few and obvious,” even if true, does not excuse its failure to identify

⁴ The Judges thus reject IPG’s argument that section 351.4(c) “is permissive, not restrictive,” and merely “recites the technical requirements” for those amendments described in the first sentence of the provision. IPG Opposition to MPAA Motion, at 5-6; IPG Opposition to SDC Motion to Strike, at 10. The provision is restrictive: it limits the amendments that may be filed as of right (*i.e.*, without permission of the Judges), to those amendments that are based on new information received in the course of discovery.

them (until its responses to MPAA's and the SDC's motions to strike). *See* IPG Opposition to MPAA Motion, at 2-4; IPG Opposition to SDC Motion to Strike, at 6-9.

Substantively, IPG's AWDS is not based on new information received during the discovery process. As a preliminary matter, the Judges reject IPG's suggestion that the regulatory phrase "new information received during the discovery process" refers only to the period of time during which discovery takes place. *See, e.g.,* IPG Opposition to MPAA Motion, at 6. The plain language of the provision refers to "new information received during the discovery *process*," not during the discovery *period*. The Judges interpret the provision to refer to the information that a participant receives from other participants through the discovery process. *See* H.R. Rep. No. 108-408, at 32 ("the 15 day period is the proper amount of time for parties to amend their written statements that reflects additional information *gained through the discovery process*.") (Jan. 30, 2004) (House Report) (emphasis added). Not all information that comes to light during the discovery period is necessarily received as part of the discovery process.

The "new information" on which IPG based its AWDS was not received through discovery, but was developed by IPG's economic consultant, Dr. Cowan, in accordance with counsel's instructions. According to Dr. Cowan, "after preparation of the August 22nd report, IPG's counsel immediately inquired about the produced results, and during the course of the next week I discovered errors in the earlier processing of the data." Cowan Decl. ¶ 9.⁵ Dr. Cowan revised his report (which constitutes a core element of IPG's direct statement) to "remedy" those errors. *Id.* All of this took place before any exchange of discovery requests, much less production of documents.

IPG, therefore, may not file its AWDS as of right under section 351.4(c).⁶

2. Section 351.4(b)(3)

IPG contends that section 351.4(b)(3) effectively authorized its filing of an amended direct statement. The provision, which requires a party to a distribution proceeding to state in its WDS its dollar or percentage claim to royalties, states that "[n]o party will be precluded from revising its claim ... at any time during the proceeding up to, and including, the filing of the proposed findings of fact and conclusions of law." 37 C.F.R. § 351.4(b)(3). IPG asserts that its AWDS is merely a "revision" of its claims, noting that "IPG could have just as validly submitted a pleading entitled 'Revision of Claims' rather than 'Amended Direct Statement,'" IPG Opposition to MPAA Motion, at 6; IPG Opposition to SDC Motion to Strike, at 10.

⁵ Counsel states that he "did not review or consider" his expert's report prior to submitting it to the Judges, "to expressly avoid any allegation that IPG had 'straitjacketed' its witness." IPG Opposition to MPAA Motion, at 3 n.4. Counsel misapprehends the concerns that the Judges have expressed about "straitjacketing," which involved the selection of all of the data supporting IPG's methodology by an individual with no relevant training or experience in economics or econometrics, a financial stake in the outcome, and a prior history of fraud. The Judges fully expect counsel for all parties to review all documents to be filed with the Judges for accuracy, and to correct errors *before* filing those documents. *See* 37 C.F.R. § 350.4(e).

⁶ That is not to say that the Judges could not consider a motion to accept an amended direct statement in appropriate circumstances. The Judges note the SDC's statement that they "do not suggest that a party may never seek leave to amend a pleading to correct a genuine error or mistake" SDC Second Reply, at 5. Since IPG made no such motion, Judges do not decide at this time whether that motion would be in order and what standards IPG would need to meet for the Judges to grant it.

IPG's open-ended interpretation of section 351.4(b)(3) is susceptible of abuse. It would, potentially, permit a party to submit an entirely new methodology at any point during a proceeding and justify it as a revised claim. IPG appears to acknowledge that there are limits to changes that would qualify as a revised claim by stressing that "IPG has not submitted a revised methodology, but merely corrected its calculations under its submitted methodology, squarely placing such amendment or revision within the ambit of" section 351.4(b)(3)). IPG Opposition to MPAA Motion, at 5; IPG Opposition to SDC Motion to Strike, at 10. Implicitly, IPG concedes that presentation of a new or revised methodology is not permitted by section 351.4(b)(3). The Judges agree. Interpretation of that provision in a manner that would permit late presentation of a new or revised methodology would be contrary to the goals of fair and efficient administration of the statutory royalty system that animate the Judges' procedural rules, and contrary to the Judges' prior decisions. *See, e.g., Distribution of the 2000, 2001, 2002 and 2003 Cable Royalty Funds*, Docket No. 2008-2 CRB CD 2000-2003 (Phase II), 78 Fed. Reg. 64984, 65004 (Oct. 30, 2013), *rev'd on other grounds sub nom. Settling Devotional Claimants v. Copyright Royalty Bd.*, 797 F.3d 1106 (D.C. Cir. 2015).

IPG's argument that its AWDS is permitted by section 351.4(b)(3) thus rests critically on its contention that it has not presented a new or revised methodology in its AWDS. IPG, MPAA and the SDC have each submitted declarations by their economic consultants taking positions on whether the modifications to IPG's direct statement constitute a revised methodology. Dr. Cowan, IPG's expert, asserts that he merely revised his calculation to rectify "errors in the earlier processing of the data."⁷ Cowan Decl. ¶ 9. Drs. Gray and Erdem—economists for MPAA and the SDC, respectively—conclude that the changes to Dr. Cowan's formulas constitute a revised methodology. *See generally* Gray Decl.; First Erdem Decl.

Based on the limited factual record before the Judges, the Judges find that Dr. Cowan revised his methodology. Dr. Cowan modified the formulas that he used to determine the relative values of IPG programming and other parties' programming. Those modifications substituted a logarithmic relationship between the dependent and independent variables (*i.e.*, a relationship between percentage changes in those variables) for a linear relationship, and changed the relative shares of satellite royalties produced by Dr. Cowan's model. *See* Gray Decl. ¶¶ 3-4. In the absence of any explanation how this change corrected a data error, the Judges must conclude that it was a methodological change.

The Judges reject IPG's argument that section 351.4(b)(3) authorized its filing of an amended WDS.

3. Prejudice to MPAA and the SDC

IPG asserts that MPAA and the SDC can identify no prejudice as a result of its filing the AWDS. IPG Opposition to MPAA Motion, at 4-5; IPG Opposition to SDC Motion to Strike, at 9. The Judges need not reach this question. IPG has not provided a legal argument why a lack of prejudice to other parties would excuse its procedural defect. IPG's assertions regarding prejudice have no bearing in this circumstance.

For the foregoing reasons, the Judges **GRANT** MPAA's and the SDC's motions to strike IPG's AWDS.

⁷ Dr. Cowan describes neither the errors nor how he corrected them by changing his formulas.

II. Motion to Distribute Satellite Funds

A. Background

The SDC, noting that the satellite royalty shares IPG proposed in its WDS for most years⁸ were within a percentage point of their own (and, no doubt, also realizing that for 8 out of 10 years, were actually higher than their own) assert that there is no longer a controversy with respect to the 1999-2009 satellite funds for the devotional category. Notice, at 2-3. They ask the Judges to make a final distribution on the basis of IPG's proposed royalty shares. *Id.* at 3.

IPG opposes the motion, alleging that the proposed royalty shares in its WDS resulted from a computation error that IPG corrected in its AWDS. Opposition, at 1-2. In addition, IPG contends that the Judges would act in a manner inconsistent with the D.C. Circuit's guidance in *Settling Devotional Claimants v. Copyright Royalty Bd.*, 797 F.3d 1106, 1120-22 (D.C. Cir. 2015) (*SDC v. CRB*), if they were to grant the SDC's motion to distribute. Specifically, IPG argues that "the Judges' distribution orders must be based upon a specific adopted methodology, and cannot simply adopt the figures of parties even if the methodological results of the parties come to the identical conclusion." Opposition, at 3.⁹ IPG further argues that if the Judges were to adopt its proposed satellite shares, it would be tantamount to adopting IPG's proposed methodology. To be consistent, IPG avers, the Judges would have to award cable royalties on the basis of IPG's methodology as well. *Id.*

In reply, the SDC argued (as discussed above) that IPG's AWDS was a "legal nullity." SDC First Reply, at 2.¹⁰ Alternatively, the SDC argue that principles of judicial estoppel prevent IPG from amending its WDS. *Id.* at 7-9. Either way, the SDC contend that the Judges should pay no heed to IPG's modified proposal. The SDC's consent to IPG's original proposed satellite royalty shares, they contend, ends the controversy over those funds, and allows the Judges to distribute them. *Id.* at 5. The SDC reject IPG's contention that the Judges must necessarily adopt IPG's methodology if they adopt IPG's proposed allocations, as well as IPG's contention that the Judges may not carry out a distribution without substantial evidence to support the Judges' adoption of an underlying distribution methodology. *Id.* at 6.

B. Analysis and Ruling

As a general matter, final distribution of cable and satellite royalties occurs in one of two circumstances: either the claimants (or their representatives) agree on their relative shares (*i.e.*, they settle), or the Judges determine the relative shares after an evidentiary hearing. The SDC asks the Judges to proceed down a third path, by declaring that the satellite funds at issue in this

⁸ Allocation of satellite royalties for 2008 has already been resolved and the funds have been distributed. See *Order Directing Final Distribution of 2008 Satellite Royalties for the Devotional Category* (Jan. 13, 2016). IPG's proposed royalty share for the SDC for 2003 and 2006 exceed the SDC's proposal by 2.03 and 5.12 percentage points, respectively. The proposals for all other years are within a percentage point of each other. The SDC thus contend that "all of the satellite royalty shares proposed by IPG are within a 'zone of reasonableness.'" Notice, at 2.

⁹ IPG also advances, but does not develop, an argument that, if the Judges decide to order distribution based on the parties' proposals, the Judges should use the SDC's proposed shares (which were more advantageous to IPG). *Id.* The SDC's theory for distributing the satellite funds without a trial is that, by consenting to IPG's proposal, the SDC have removed any controversy. The SDC's consenting to *their own* proposed shares would hardly advance that theory.

¹⁰ The SDC also argues that IPG's AWDS was "a clear attempt to avoid" the SDC's distribution motion, and the Judges should ignore IPG's revised proposal for that reason. *Id.* Given the Judges' ruling concerning the AWDS, the Judges need not delve into questions concerning IPG's motivation for amending its WDS at this time.

proceeding are not subject to controversy, and distributing them pursuant to section 801(b)(3)(A) of the Act. That path, though not untrodden,¹¹ is certainly a road less travelled.

In the *December 2015 Distribution Order* the Judges followed this third path because both parties to the controversy over 2008 satellite funds proposed the exact same royalty shares. *See December 2015 Distribution Order*, at 1. This was due not to any coincidence or convergence of the parties' respective expert valuations, but to the Judges' earlier determination that one party had no valid satellite claims in 2008 in the relevant category. *See id.* at 1-2. Under the circumstances there was simply nothing left to litigate once the Judges had resolved all claims disputes.

The SDC argue that the Judges now face the equivalent situation. Although the SDC and IPG proposals clearly were not identical (except as to satellite royalties for 2000), the SDC contend that their acquiescence in IPG's proposed satellite shares resolves any remaining controversy. The Judges disagree. IPG has repudiated the proposed shares set forth in its WDS that the SDC purport to accept. To be sure, the Judges have stricken the AWDS in which IPG sought to present proposed shares that would supersede those in its WDS. However, the Judges fully expect that IPG will ask the Judges to exercise their discretion and allow IPG to amend its WDS. Until the Judges have considered and resolved that issue (or the parties present them with a settlement) they must acknowledge that the funds at issue *are* subject to controversy.

For the foregoing reason only, the Judges **DENY** the SDC's distribution motion. The Judges need not consider any of IPG's additional arguments, and the SDC's counterarguments thereto.

III. Ancillary Motion to Strike Second Erdem Declaration

The Judges have considered the IPG Motion to Strike, and the SDC's response thereto. Finding that the Second Erdem Decl. responds to assertions made in IPG's Opposition and the accompanying Cowan Decl., the Judges **DENY** the IPG Motion to Strike.¹²

IV. Conclusion

For the foregoing reasons (a) the MPAA Motion to Strike, and the SDC's motion to strike (contained within the SDC First Reply) are **GRANTED** and IPG's AWDS is stricken; (b) the SDC's distribution motion (contained in its Notice) is **DENIED**; and (c) the IPG Motion to Strike is **DENIED**.

SO ORDERED.

Suzanne M. Barnett
Chief Copyright Royalty Judge

Dated: October 7, 2016

¹¹ See Order Granting Final Distribution of 2008 Satellite Royalties for Devotional Claimants (Dec. 22, 2015) (*December 2015 Distribution Order*).

¹² The Judges observe, however, that their decision granting MPAA's and the SDC's motions to strike IPG's AWDS does not rely on the Second Erdem Decl.